ATTACHMENT 1

Comments of PAETEC Holding Corp.

Filed in WC Docket Nos. 06-172 and 07-97 (September 21, 2009)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	)))))))	WC Docket No. 06-172
In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	))))))	WC Docket No. 07-97

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TABLE OF CONTENTS

TABLE OF CONTENTS II

I. INTRODUCTION AND SUMMARY 1

II. THE OMAHA FORBEARANCE STANDARD HARMS CONSUMERS AND COMPETITION BY SUBJECTING THEM TO A DUOPOLY 6

- A. The Commission's Predictive Judgment About Wholesale Competition Has Been Proven To Be Mistaken 9
- B. Duopoly Markets Are Contrary to the Public Interest 12
- C. The Omaha Forbearance Framework Fails to Recognize Distinctions Between Relevant Product Markets 19
- D. The Existing Framework For Analyzing "Facilities-Based Competition" In UNE Forbearance Proceedings Is Irrational 20
- E. The Past Geographic Analysis Ignores Marketplace Realities 22
- F. The Omaha Test Does Not Identify Locations Where Competitors Have Facilities Available to Serve Customers 22

III. THE COMMISSION SHOULD EMPLOY AN ANALYTICAL FRAMEWORK SIMILAR TO ITS TRADITIONAL MARKET POWER ANALYSIS 24

- A. Market Share Analysis 28
  1. The Commission Should Require the Presence of Two Facilities Based Wireline Competitors Before Granting Forbearance 29
  2. The Proposed Two-Competitor Test is a Reasonable Measure to Guard Against Dangers Inherent in Highly Concentrated Markets 31
  3. The FCC Should Limit the Analysis to Facilities-Based Competitors to the ILEC 32
  4. The Commission's Market Power Analysis Should Give More Weight to Actual Than Potential Competition 33
     a. Section 10 focuses on present day market realities 35
     b. Potential competition is already incorporated in the impairment standard and FCC should limit its weight 36
- B. The Commission Should Consider Supply Elasticity 37
  1. Ability To Add "Significant Additional Capacity" 38
  2. Ability to Overcome Entry Barriers 38
- C. The Commission Should Consider Demand Elasticity 39

IV. THE FCC SHOULD EXAMINE COMPETITION IN DISCRETE PRODUCT AND GEOGRAPHIC MARKETS 40

A. Product Markets Must Be Defined Based on Sound Economic Criteria 40

1. Separate Analyses of Wholesale and Retail Competition 42

2. Separate Analysis of Residential and Business Markets 43

3. Products That Most Consumers Do Not View As A Substitute (*e.g.*, wireless) Are Not In The Same Product Market, Even If A Subset Of Consumers Do Substitute Them 43

B. The Commission Should Standardize the MSA as the Appropriate Geographic Market for Analyzing the Statutory Forbearance Criteria 45

V. CONCLUSION 47

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COMMENTS

PAETEC Holding Corp., on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC, and McLeodUSA Telecommunications Services, Inc. (jointly referred to as "PAETEC") submits these comments in response to the Public Notice seeking comment on the remand of recent decisions from the United States Court of Appeals for the D.C. Circuit.[1]

I. INTRODUCTION AND SUMMARY

On June 19, 2009,[2] the U.S. Court of Appeals for the D.C. Circuit held that the Commission had erroneously denied Verizon's petitions for forbearance from UNE

[1] *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order, Pleading Cycle Established*, WC Docket Nos. 06-172, 07-97, Public Notice, DA 09-1835 (rel. Aug. 20, 2009).

[2] *Verizon Tel. Cos. v. FCC*, No. 08-1012 (D.C. Cir. June 19, 2009).

regulations in the Commission's *Verizon Six-MSA Order*.[3] In remanding the *Verizon Six-MSA Order*, the Court found that the Commission's reliance on the extent of *actual* competition as measured by the incumbent carrier's market share, while excluding consideration of *potential* competition, was an unexplained departure from FCC precedent. The Court also criticized the Commission for finding that the six Verizon markets were insufficiently competitive in light of the lack of alternative sources for wholesale inputs. In previous UNE forbearance orders, the Commission found that such a lack of wholesale alternatives did not prevent forbearance. The Court, however, accepted as reasonable the Commission's approach that Section 10 requires a separate analysis from that conducted under Section 251 for impairment and rejected the RBOC argument that "unnecessarily conflate[d]" the two independent statutory provisions.[4]

On remand, the Commission must reconsider how to apply factors other than market share in its forbearance analysis. The D.C. Circuit criticized the Commission's previous forbearance analysis because it "zeroed in on … market share as the dispositive factor."[5] The Commission had argued that in addition to market share it considered competition in the business market and competition for wholesale services.[6] The Court, however, found that facilities-based competition for business and wholesale customers

[3] *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*Verizon Six-MSA Order*"). On August 5, 2009, the Court, on the FCC's own motion, remanded the decision in *In the Matter of Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729 (July 25, 2008).

[4] *Verizon Tel. Cos. v. FCC*, slip op. at 11.

[5] *Id.* at 13.

[6] *Id.* at 14.

"played no meaningful role in the FCC's determination" that the metropolitan statistical areas ("MSAs") at issue in the *Verizon Six--MSA Order* were not competitive enough to warrant forbearance.[7] As it explained:

> In the *Omaha* [*Forbearance*] *Order*, the FCC relied on evidence that the CLEC had already had success attracting ... business customers and had "emerging success in the enterprise market" to support its conclusion that certain areas within the MSA were sufficiently competitive for UNE forbearance. The FCC also noted that the CLEC "possess[ed] ... the necessary facilities to provide enterprise services," and had "sunk investments in network infrastructure." *Id.* And yet, in the [*Verizon Six-MSA*] *Order* under review, the FCC found similar evidence submitted by Verizon *insufficient* to support a finding of competitiveness in the six MSAs.[8]

In both the *Omaha* and *Anchorage Forbearance Orders*, the FCC found that the record did not "reflect any significant alternative sources of wholesale inputs for carriers" in either the Omaha or Anchorage MSAs,[9] yet it determined in both cases that forbearance was warranted. The Court found:

> The fact that these factors were applied similarly but yielded opposite results renders them meaningless in the analysis. Removing these factors from the analysis, the only distinguishing factor between the *Omaha* and *Anchorage Orders*, in which the FCC granted forbearance, and [the *Verizon Six-MSA*] *Order*, in which the FCC denied forbearance, is that the ILECs in the *Omaha* and *Anchorage Orders* no longer possessed

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7 *Verizon v. FCC*, at 14.

8 *Verizon v. FCC*, at 14 (internal citations omitted).

9 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19448 (2005) ("*Omaha Forbearance Order*"), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, 1977 (2007).

> [*redacted*] percent of the marketplace, whereas in this case Verizon has not yet lost that same percentage in the six MSAs at issue.[10]

Because the Court found that the Commission could not "convincingly argue that these factors now prevent Verizon's petition for UNE forbearance when the same factors did not prevent forbearance in the *Omaha* and *Anchorage* Orders," the Court concluded that Verizon's market share was the "dispositive and essential factor" in the Commission's conclusion to deny Verizon's UNE forbearance petitions, and "not merely one of several factors in its determination."[11] It held that the Commission's shift lacked a sufficient explanation and was thus arbitrary.[12]

The Court also held that the *Verizon Six-MSA Order*, by employing a bright line market share test focusing solely on actual competition, departed from its forbearance and impairment precedent that also considered an assessment of potential competition.[13]

Importantly, the Court did not conclude that any part of the FCC's analysis was inconsistent with its authority under Section 10. Instead, the Court explained that "it may be reasonable in certain instances for the [Commission] to consider an ILEC's possession of … [a] … particular percentage of the marketplace as a key factor in the agency's determination that a marketplace is not sufficiently competitive to ensure its competitors' abilities to compete."[14] Similarly the Court held, "[i]t may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competi-

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10 *Verizon v. FCC*, at 15.

11 *Id.* at 15-16 (internal citation omitted).

12 *Id.*

13 *Id.* at 16-17.

14 *Id.* at 17-18.

tion."[15] In other words, the "flaw [in the *Verizon Six-MSA Order*] is not in this change, but rather in the FCC's failure to explain it."[16] On remand, the Court's command was simply for the Commission to explain its departure or remedy the failure in analysis.

It is incumbent upon the Commission to take this opportunity to adequately explain and enhance the forbearance standard. It should recognize that its previous forbearance decisions were flawed and adopt a new framework for analyzing petitions for forbearance from the Act's unbundling obligations. This revised framework should respond to the issues raised by the Court's remand, remedy the serious deficiencies in the *Omaha Forbearance Order* and faithfully adhere to the statutory test set forth in Section 10 to be consistent with the Act's impairment framework, sound competition policy and economics, and the statutory forbearance criteria.[17]

The Commission's prior UNE forbearance decisions have not rationally focused on the presence of actual facilities-based competitors in deciding whether to forbear from the Act's central market opening measure. The Commission need only look to Qwest's anti-competitive behavior in the Omaha MSA post-forbearance as reason to revise its forbearance standard. The Commission should employ an analytical framework similar to its traditional market power analysis, that examines market share, supply elasticity, barriers to entry and demand elasticity. in analyzing competition under its traditional market power framework the Commission should emphasize competition from wireline

[15] *Id.*

[16] *Id.*

[17] It is well-established that the Commission is "entitled to reconsider and revise its views as to the public interest and the means to protect that interest," so long as it gives a reasoned explanation for the revision. *See, e.g., DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). *See also FCC v. Fox Television Stations, Inc. et al.*, 556 U.S. ___, slip op. 10-11 (2009).

competitors that have deployed their own last mile loop facilities because competition from wireless (whether fixed or mobile), satellite, VoIP and broadband over powerline is neither currently significant nor capable of disciplining the incentive of the cable and RBOC incumbents to tend toward duopolistic behavior. The Commission should further recognize, as it has before in other contexts, that duopoly markets are unduly concentrated and therefore not competitive.

As part of its analysis, the Commission should examine competition from competitors that have deployed their own loop facilities in distinct product markets. Initially, the Commission's product market analysis should distinguish between wholesale and retail product markets as well as between the residential and business market. Lastly, the Commission should establish the MSA as the appropriate geographic area in which to analyze requests for forbearance filed pursuant to Section 10.

II. THE OMAHA FORBEARANCE STANDARD HARMS CONSUMERS AND COMPETITION BY SUBJECTING THEM TO A DUOPOLY

Although one way of addressing the Court's remand would simply be to revert to the earlier *Omaha Forbearance Order* analysis and apply it to the Verizon and Qwest petitions, that approach would ignore substantial record evidence of serious deficiencies in the *Omaha Forbearance Order* methodology. The first of these deficiencies is the *Omaha Forbearance Order*'s failure to acknowledge the dangers of duopoly even in the face of FCC precedent and antitrust jurisprudence emphasizing such dangers.

In evaluating previous petitions requesting forbearance from the Act's unbundling provisions, the Commission has, over the objection of wireline competitors, twice granted forbearance in markets where only one viable competitor to the incumbent is providing facilities based competition using its own last mile facilities,[18] and where there is no serious prospect of additional facilities-based entry. The resulting market reality, characterized by a cable-RBOC duopoly in the residential market and significantly more limited competition in the business market has — as competitors correctly warned — chilled investment, marginalized or wholly driven out competitors and allowed the entrenched incumbents to raise prices.[19]

As discussed in Section II.A herein, the Commission need only look to Qwest's anti-competitive behavior in the Omaha MSA post-forbearance. PAETEC's subsidiary, McLeodUSA, formerly one of the largest competitors to Qwest and Cox in Omaha, is in the midst of exiting the market as a direct result of the forbearance order because of its inability to secure wholesale inputs at prices that allow it to remain competitive.[20] Other CLECs that planned to enter the market did not because of the change in market conditions.[21] Indeed, the Commission has repeatedly found that a duopoly does not give rise to

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18 It is important to note that the single facilities-based competitor was providing such competition on a limited basis to a particular market segment and geographic area.

19 *See, e.g.,* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No 04-223, at 4, 8 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

20 *See* McLeodUSA Petition for Modification at 4-12. *See also "Verizon Seeks Forbearance in All of Rhode Island,"* xchange Magazine, Feb. 15, 2008 (available at http://www.xchangemage.com/articles/525/verizon-seeks-forbearance-in-all-of-rhode-isl.html) (visited Mar. 25, 2008). This also highlights again the perils of engaging in predictive judgment as to the state of competition in a particular market in lieu of reliance upon an analysis of actual competition.

21 *See, e.g.,* Letter from Dudley Slater, CEO, Integra Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-233 (filed Sept. 14, 2005).

effective competition.[22] As shown below, the weaknesses of the extremely limited competition in a duopoly environment are well established.

In applying its forbearance power under Section 10(a), the Commission has heretofore required the development of a much more significant level of competition than that which local exchange markets currently exhibit. For instance, in determining whether to forbear from the requirements of Sections 201 and 202 of the Act for broadband PCS providers, the Commission clearly suggested that duopoly market power would not be sufficient to support forbearance.[23] The Commission noted that even though the CMRS market was progressing from duopoly market power, it was still not enough for forbearance. The Commission found that:

> the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring. The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched. These price declines, however, have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. ... Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.[24]

The Commission found "that current market conditions alone will not adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and

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[22] *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and American Online, Inc. Transerors, to AOL Time Warner Inc. Transferee,* Memorandum Opinion and Order, 16 FCC Rcd 6547, 6617 ¶ 163 (2001).

[23] *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 21 (1998) ("Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source").

[24] *Id.* at ¶ 22.

practices" and, therefore, concluded that the first prong of the Section 10 forbearance standard had not been satisfied.[25] Similarly, in considering ILEC petitions for forbearance, the Commission should consider broadly the long-term competitive development of the wireline local exchange market, not just a snapshot of market share.

A. The Commission's Predictive Judgment About Wholesale Competition Has Been Proven To Be Mistaken

The failed Omaha experiment is evidence that a cable-RBOC duopoly does not benefit consumers. For one, wireline competitors have largely abandoned the Omaha market. McLeodUSA, previously the largest facilities-based CLEC operating in pre-forbearance Omaha, ceased selling services to new customers and continues the costly process of exiting from the Omaha market due to the *Omaha Forbearance Order*. This withdrawal from Omaha was directly caused by the absence of any enforceable unbundling rule which deprived competitors of reasonable access to the loop facilities that are essential to competition.[26]

In the *Omaha Forbearance Order*, the Commission rendered a "predictive judgment" that Qwest would have an incentive to offer commercially reasonable wholesale alternatives to Section 251(c)(3) obligations. The Commission's prediction was wrong. Instead of being incented to offer its largest wholesale customer in the market reasonable prices to continue accessing Qwest's deregulated network facilities, as predicted by the FCC, Qwest's "negotiations" consisted of offering McLeodUSA take it or leave it terms

[25] *Id.* at ¶ 24.

[26] *See* Letter from William A. Haas, VP — Regulatory and Policy, PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 3-6 (filed July 10, 2008); *See* Letter from Russell Blau, Counsel to PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 1 (filed June 25, 2008).

featuring a 30% price increase on DS0 loops and its standard special access offerings on high capacity loops and transport.[27] The complete lack of incentive for Qwest to offer CLECs a reasonably priced "commercial" wholesale option created by the limited presence of Cox in Omaha could not be clearer than the fact a CLEC can get exactly the same commercial special access pricing in other Qwest markets as in Omaha. The alleged competition from Cox has caused Qwest to do absolutely nothing to keep wholesale customers in Omaha as opposed to what it offers in markets that have less retail competition.

It should come as no surprise that the Commission's predictive judgment has been proven incorrect — antitrust law has for decades operated under the premise that "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."[28] As the D.C. Circuit has explained, in a market "characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions."[29] Despite this principle, one that the Commission has applied in other contexts, it adopted a forbearance test predicated on a

[27] *See* Letter from William A. Haas, VP — Regulatory and Policy, PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 3-6 (filed July 10, 2008); *See* Letter from Russell Blau, Counsel to PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 1 (filed June 25, 2008). *See also*, Letter from Andy Lipman, *et al.*, Counsel to Affinity Telecom, Inc., *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed June 30, 2008).

[28] *F.T.C. v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).

[29] *Federal Trade Commission v. H.J. Heinz Co. et al.*, 246 F.3d 708, 725 (D.C. Cir. 2001) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

contrary prediction that robust wholesale competitive behavior would emerge between two firms, one of which, *i.e.,* Cox, was not even capable of or willing to offer a comparable wholesale service in the vast majority of locations required by competitors. The FCC's failure to give due weight to the incontrovertible fact that Cox was not a wholesale provider of last mile access to nearly all non-residential end user locations meant its prediction was doomed to fail.

In a highly concentrated market where there are two dominant suppliers and high barriers to entry, each of the two market participants has an incentive to foreclose other competitors' access to critical inputs that would facilitate entry. In the absence of any regulatory compulsion to offer that access, such as through unbundling, it is not surprising that neither the RBOC nor the cable operator offers wholesale access on terms that allow meaningful competition to develop. In hindsight, it is inconceivable how anyone could rationally have predicted that Qwest, which so enthusiastically sought to avoid providing UNEs under Section 251(c)(3) at cost-based rates that granted it a reasonable return on its investment, would have been incented to turn around and provide reasonable wholesale access anyway, when in fact Qwest could achieve higher revenues by recapturing its wholesale customers' end users and serving those same customers on a retail basis after driving its former wholesale customer out of the market while also eliminating the potential entry of any other new CLEC into the Omaha market.

In addition, the Omaha forbearance standard failed to recognize the importance of wholesale competition to the development of meaningful retail competition. The *Omaha Forbearance Order*, while acknowledging the lack of any alternative for wholesale supply of loops, simply ignored the consequences of this lack of wholesale competition.

In highly concentrated markets such as local telephone markets, the owners of the critical last mile connections have no incentive to offer access that provides a means for competitors to enter the market where entry barriers would ordinarily preclude such competitive entry. The mere presence of retail competition from a single cable competitor, which was incapable of offering a wholesale access alternative to the vast majority of end user locations, proved unable to create further competition. As demonstrated in Omaha, in fact, forbearance led to further concentration and less competition.

B. Duopoly Markets Are Contrary to the Public Interest

Duopoly markets are unduly concentrated and therefore not competitive. The Commission's Omaha forbearance framework was predicated on the supposition that competition from cable companies was sufficient to check the ILEC's market power in local telephone markets where the cable company achieved certain levels of market share and facilities coverage. This proposition ignored the uniformly held view of economists, antitrust law and the Commission itself, as well as ample practical experience, that duopoly markets are not competitive. Under antitrust doctrine, "the more plausible theories and the evidence suggest strongly that oligopoly pricing departs from competitive norms, often substantially."[30] Other parties in similar UNE-forbearance proceeding have explained that economic analysis shows that duopolies lead to supracompetitive prices.[31]

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30 Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 404b (2d edition 1998-2006 and supp. Sep. 2006).

31 *See, e.g.,* Opposition of Telecom Investors to Verizon New England's Petition, WC Docket No. 08-24, at 20-33 (filed March 28, 2008) ("Telecom Investors Rhode Island Opposition"); Opposition of Telecom Investors to Verizon's Petition, WC Docket No. 08-49, at 21-34 (filed May 13, 2008).

Until the *Omaha Forbearance Order*, the Commission itself consistently had held that duopoly markets are insufficiently competitive because duopolists tend to collude, even if tacitly, so as to achieve supracompetitive rates and restrict product offerings. For example, it explained that a merger resulting in duopoly carries a "strong presumption of significant anticompetitive effects."[32] In his separate statement, Chairman Powell emphasized "[a]t best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."[33]

When considering the marketplace for wireless services, the Commission has held that "the duopoly market structure was established in full recognition of the fact that only two carriers to a market was not ideal in terms of promoting competition"[34] and that "duopoly cellular market" is "imperfectly competitive."[35] Overall, the Commission has observed that only "a market that has five or more relatively equally sized firms can

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[32] *Application of Echostar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, 20604-05, ¶¶ 99, 102 (2002) ("*Echostar*").

[33] *Id.*, 17 FCC Rcd at 20684, Separate Statement of Chairman Michael K. Powell.

[34] *Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 1719, 1730, ¶ 47 n.67 (1991).

[35] *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18470, ¶ 27 (1996).

achieve a level of market performance comparable to a fragmented, structurally competitive market."[36]

Even when addressing the marketplace for instant messaging, the Commission stated:

> From among all entrants into the IM business, AOL points especially to Microsoft as a significant rival. AOL claims that Microsoft's presence, and especially its recent growth in the market, demonstrates that AOL does not dominate IM. ... However, Microsoft has not always been able to leverage its control of the Windows desktop into dominance of other applications. In addition, in IM today, AOL benefits from network effects and first mover advantages; and, as we discuss below, the proposed merger would give AOL significant, additional advantages over Microsoft, Yahoo!, and smaller IM providers. *And even if Microsoft's NPD did grow to rival AOL's, the result would be merely a duopoly, not the healthy competition that exists today in electronic mail and that we hope will exist in new IM-based services and AIHS in particular.*[37]

And as the Commission explained in regard to ILEC/cable duopolies:

> We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be "impaired" within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers. A standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are "impaired" under section 251(d)(2), would be inconsistent with the Act's goal of creating robust competition in telecommunications. In particular, such a standard would not create competition among multiple providers of local service that would drive down prices to competitive levels. Indeed, such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market. An absence of

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[36] *2002 Biennial Review — Review of the Commission's Broadcast Ownership Rules Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13731, ¶ 289 (2002).

[37] *Applications of Time Warner Inc. and America Online, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6617, ¶ 163 (2001) (emphasis supplied).

multiple providers serving various markets would significantly limit the benefits of competition that would otherwise flow to consumers.[38]

The Commission's policy of prohibiting duopoly markets is consistent with antitrust law. As the D.C. Circuit explains, in the context of approving the FTC's rejection of a merger to duopoly, "a durable duopoly affords both the opportunity and the incentive for both firms to coordinate to increase prices ... above competitive levels"[39] and that "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."[40] Thus under *Heinz*, there is a "presumption" that a duopoly market such as in *Heinz* would "lessen competition." Indeed, courts continue to uphold the FTC's application of the D.C. Circuit's analysis in *Heinz* barring undue concentration in markets where there are two principal competitors.[41]

The Department of Justice has likewise prohibited mergers to duopoly, most notably in the complaint it filed to block the merger of WorldCom and Sprint. In that complaint, the DOJ found that in a number of telecommunications markets there were three competitors that controlled over 80% of the market share. While the applicants Sprint and WorldCom were second and third in market share, the DOJ determined that the post merger Herfindahl-Hirschman Index ("HHI") would lead to an unduly concen-

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[38] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3727, ¶ 55 (1999).

[39] *H.J. Heinz Co.*, 246 F.3d at 725.

[40] *Id.* at 724.

[41] *See FTC v CCC Holdings*, 2009 WL 723031 *7, 15 (D.D.C. 2009) (upholding FTC's injunction to prevent merger from 3 to 2 competitors in the market for software used to estimate costs to repair damaged vehicles).

trated market with two principal participants — in other words a duopoly.[42] This duopoly then would have "facilitate[d] coordinated or collusive pricing or other anticompetitive behavior by the" duopolists.[43] The duopolists would also "be able to raise prices without losing sufficient sales" to fringe competitors to offset the increased revenues.[44] This fringe competition was therefore "insufficient to prevent coordinated pricing or other anticompetitive behavior" by the two principal players in the market.[45]

Experience in the cable market unfortunately bears out the Commission's and the antitrust agencies' concern with duopolies. For example, on November 1, 2008, Comcast increased its rates for its standard service by 6.4 percent throughout the Richmond, VA metropolitan region, notwithstanding Verizon's presence in the cable television market in the region.[46]

One senior policy analyst with the Consumers Union conjectured that the companies do not plan to compete over price, but instead over bundled services.[47] If so, this is contrary to the public interest as expressed by former Chairman Martin when commenting about the lack of choice inherent in bundling. According to former Chairman Martin, "[c]able companies explain away their skyrocketing prices by saying they are giving you more and more channels. At no time, however, have the cable companies actually asked

[42] *United States v. WorldCom, Inc. and Sprint Corp.*, Complaint, ¶¶ 62, 90, 107 (June 26, 2000) ("DOJ Complaint").

[43] *Id.* ¶ 69.

[44] *Id.* ¶ 70.

[45] *Id.* ¶ 71. The DOJ reached similar conclusions regarding the other markets it found would exist as post-merger duopolies. *See id*, ¶¶ 94-95, 112, 134.

[46] Emily C. Dooley, *Comcast's Cable Rates to Increase Nov. 1: company cites higher costs and says average bill will rise 3.7 percent*, RICHMOND TIMES DISPATCH, Oct. 8, 2008.

[47] *Id.*

if you want those additional channels. You have to pay for them whether you want them or not."[48] It stands to reason that the benefits of unbundled availability would also extend to other services, like telephone and broadband. Otherwise, customers will not be able to avail themselves of lower prices for one service, *e.g.*, Internet access, without purchasing services that they do not want, *e.g.*, video or phone. Moreover, a customer that has to change all three services — phone, broadband and video — in order to switch providers for one service will find it much more burdensome. Former Chairman Martin argued that "the solution to high cable bills isn't price controls or additional government regulation. It is more competition and more choice."[49] However, it is increasingly evident that a cable-telco duopoly provides neither for phone nor for cable services.

Former Chairman Martin's concerns were confirmed when the Commission reported that average cable rates actually *increased* from one year to the next in markets that had a single wireline competitor to the incumbent cable operator. Communities with a single wireline competitor have seen greater cable rate increases than the overall market since 2004. In those areas, cable rates increased 5.3% to $35.94 in 2004,[50] 2.5% to $36.85 in 2005, 4.2% to $38.45 in 2006, 6.7% to $42.59 in 2007, and 5.5% to $44.92 in 2008.[51] Similar evidence of the danger of a deregulated duopoly is provided by the steady rate

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48 John McCain and Kevin Martin, *Make Cable Go A La Carte*, LOS ANGELES TIMES, May 25, 2006.

49 *Id.*

50 *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 21 FCC Rcd 15087, Table 1 (2006).

51 *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009).

increases in California following the California's Public Utility Commission's ("CPUC") decision to lift price caps for the state's dominant ILECs. In August 2006, the CPUC found that the ILECs "no longer possess market power" based on "the demonstrated presence of competitors throughout their service territories" and that competition would protect the interest of consumers.[52] In support of its decision, the CPUC "relied heavily on the conclusion that wireless mobility services are a close substitute for wireline telephone service."[53] However, the latest analysis conducted in California demonstrates that many consumers will "find it difficult to substitute wireless for wireline service."[54] Consequently and instead of price competition, "California consumers have experienced a staggering stream of rate hikes."[55] The TURN Study accordingly concluded that, "that wireless service is not a 'close substitute' for wireline for most customers" and that "[w]ireless substitution is unlikely to provide a pricing constraint on local telephone company services."[56] The TURN Study further found that cable alternatives also have "substantial limitations on the ability of these services to constrain telephone company price increases."[57] In addition, since release of the *Qwest 4-MSA Order,* both the DOJ and, the telecommunications regulatory authority in the United Kingdom, Ofcom, "have conducted rigorous analyses and released reports that conclude, based on the widely accepted methodology for defining relevant product markets, that wireline and wireless

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[52] D.06-08-30 at 132 and 275.

[53] *See*, Trevor R. Roycroft, Ph.D., "Why 'Competition' is Failing to Protect Consumers - Full Report," The Utility Reform Network, at ii (March 25, 2009) ("TURN Study").

[54] *Id.*, at 18.

[55] *Id.*, at C-2.

[56] *Id.* at 15.

[57] *See* TURN Study at 4.

services are complementary and not substitutable services and therefore belong in separate product markets, notwithstanding that a certain subgroup of wireline customers have cut-the-cord and are now exclusively using wireless services."[58]

At bottom, the Commission cannot find that an ILEC-cable duopoly would protect against anticompetitive behavior. As the above fully shows, duopoly markets do not encourage competitive behavior but rather facilitate price increases and other anticompetitive conduct. Such a duopoly, as demonstrated by the failed experiment in Omaha, is the exact opposite of the competitive conditions that would satisfy the public interest test of Section 10 requiring forbearance to "promote" competition.

C. The Omaha Forbearance Framework Fails to Recognize Distinctions Between Relevant Product Markets

The Commission's competition analysis in the *Omaha Forbearance Order* failed to take separate residential and business markets into account — both in analyzing deployment of competitive loop facilities and in evaluating competitors' market share. In considering whether facilities based competitors had deployed their own loop facilities[59] to 75% of all end user locations in the geographic market, the Commission did not differentiate between residential locations and business locations. Thus it could have granted forbearance for UNEs used in business markets even if *no* business locations

[58] Letter from Brad E. Mutschelknaus, Counsel to Broadview Networks, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-49, at 2 (filed April 20, 2009). *See also*, Letter from Thomas Jones, Counsel to One Communications Corp. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-24, at 7-11 (filed Dec. 3, 2008).

[59] The Commission further compounded its error in its coverage test by only considering whether Cox facilities "passed by" a certain percentage of end user premises. As discussed *infra*, there are significant physical and economic barriers that make this coverage test an unreasonable measure of deployed "loop facilities." *See* Section III.A.1, below.

were actually served by the facilities based cable provider. The Commission simply failed to examine whether and to what extent competitors had actually deployed loop facilities in the business market. The Commission was instead apparently content to assume that cable competitors would extend their networks serving residential customers to business markets in a reasonable period of time, without any data to support its assumption.

With respect to market share, the Commission limited its analysis to residential market share and "predicted" that competitors would make similar inroads in the business market. The Commission further erred by not analyzing the extent to which competitors, including Cox Cable in Omaha, were actually serving business customers that demand the kind of robust and reliable services that competitors use UNEs to provide.

D. The Existing Framework For Analyzing "Facilities-Based Competition" In UNE Forbearance Proceedings Is Irrational

The Commission's UNE forbearance decisions have not rationally focused on the presence of actual facilities-based competitors in deciding whether to forbear from the Act's central market opening measure. In past UNE forbearance decisions, the Commission included resale as the equivalent to facilities based competition, despite the fact that resellers obviously rely on the ILEC's facilities to provide service. Similarly, the Commission has treated so called "commercial agreement" UNE-P replacement services as facilities based competitors, although competitors using these services obtain loops and local switching from the ILEC. Moreover, the record in the Omaha docket shows that many competitors that had resorted to commercial UNE-P arrangements in fact no longer compete in the market. This confirms that relieving an ILEC of its unbundling obligations does not promote competition but instead, permits the ILEC to drive its competition out of the market.

The Commission cannot rationally base its forbearance decision on competition that relies on the RBOCs' loops as a basis for eliminating access to those same loops because they do not constitute independent facilities-based competition. In addressing this precise issue, the Commission has held that "[g]ranting forbearance from the application of Section 251(c)(3) on the basis of competition that exists only due to Section 251(c)(3) would undercut the very competition being used to justify the forbearance," and it properly "decline[d] to engage in that type of circular justification."[60]

More importantly, the Commission's forbearance decisions under Section 10(a) must consider whether regulation is prospectively "necessary" to ensure reasonable prices and to protect consumers. The RBOCs' arguments in favor of forbearance assert that UNE regulation is unnecessary because their market conduct will be constrained by competition even if UNEs are no longer available. To the extent that that "competition" is dependent on the RBOC's choice to offer resold services or underlying facilities on "reasonable" terms, however, it cannot rationally be expected to serve as a substitute for regulatory constraints. If the RBOC's retail pricing were being challenged by competition from resellers or special-access based carriers, the RBOC could simply increase the costs of the inputs it provides those competitors as much as it feels necessary to allow it to set retail prices as desired.

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[60] *Omaha Forbearance Order*, 20 FCC Rcd at 19450, ¶ 68 n.185.